



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Doc. No.: AMS-SC-19-0068; SC19-966-3]

Tomatoes Grown in Florida; Proposed Amendments to the Marketing Order No. 966 and Referendum Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes amendments to Marketing Order No. 966, which regulates the handling of tomatoes grown in Florida. The proposed amendments would change the Florida Tomato Committee's (Committee) size, length of the terms of office, and quorum requirements.

DATES: The referendum will be conducted from May 11, 2020, through June 1, 2020. The representative period for the referendum is October 1, 2018, through September 30, 2019.

ADDRESSES: Interested persons with questions may send comments to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938.

FOR FURTHER INFORMATION CONTACT: Geronimo Quinones, Marketing Specialist, or Andrew Hatch, Rulemaking Services Branch Chief, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Geronimo.Quinones@usda.gov or Andrew.Hatch@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This proposal, pursuant to 5 U.S.C. 553, proposes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposal is issued under Marketing Order No. 966, as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida. Part 966 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of tomato

producers and handlers operating within the area of production.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect. This proposed rule shall not be deemed to preclude, preempt, or supersede any State program covering tomatoes grown in Florida.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order,

any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 8c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 8c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendment, the potential regulatory and

economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments proposed are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the Order.

The proposed amendments were unanimously recommended by the Committee following deliberations at two public meetings held on November 1, 2018, and February 27, 2019. The proposals would amend the Order by changing the Committee's size, the length of term of office, and quorum requirements.

A proposed rule soliciting comments on the proposed amendments was issued on September 23, 2019 and published in the *Federal Register* on October 1, 2019 (84 FR 52044). No comments were received. AMS will conduct a producer referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments if they are favored by producers in the referendum.

The Committee's proposals would amend the Order by changing the Committee's size, the length of term of office, and quorum requirements.

Proposal 1 - Reduce Committee Size

Section 966.22 provides that the Committee consists of 12 members and, for each member of the Committee, there must be an alternate who has the same qualifications as the member. This proposal would amend § 966.22 by reducing the size of the Committee from 12 to 10 members. The requirement that each member have an alternate with the same qualifications as the member would remain unchanged.

Since promulgation of the Order in 1995, the Florida tomato industry has seen reductions of about 80% in the number of tomato producers and 33% of registered handlers. Industry consolidation and land development pressure have also contributed to this decline. Decreasing the Committee's size from 12 members to 10 members would make Committee membership more reflective of today's industry and enable it to fulfill quorum requirements.

Proposal 2 - Revise Term of Office

Section 966.23 requires Committee members and their alternates to serve for one year.

This proposal would change § 966.23 by revising the term of office for producer members from one year to two years beginning on August 1 and ending as of July 31. Currently, the nominating process for the 12 members and alternate members is conducted annually. This proposed change would reduce the annual turnover on the Committee and provide time for new members and alternates to learn the details of Committee operations and business.

Proposal 3 - Revise Quorum Requirements

Currently, § 966.32 states that eight members of the Committee shall constitute a quorum, and the same number of concurring votes shall be required to pass any motion or approve any Committee action.

The proposed change would modify § 966.32 to allow six members to constitute a quorum. The requirement that the same number of concurring votes (six) shall be required to pass any motion or approve any Committee action would remain unchanged. The Committee is experiencing difficulties filling all seats and obtaining a quorum at meetings since several seats have been vacant. Adjusting the current requirements would enable the Committee to operate fully and increase the chance of reaching a quorum during scheduled meetings. These changes would help to

streamline the Committee's operations and increase its effectiveness.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 75 producers of Florida tomatoes in the production area and 37 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to industry and Committee data, the average annual price for fresh Florida tomatoes during the 2017-18 season was approximately \$12.56 per 25-pound container, and total fresh shipments were 25.9 million containers. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, the majority of handlers have average annual receipts less than \$30,000,000 (\$12.56 times 25.9 million containers equals \$325,304,000 divided by 37 handlers equals \$8,792,000 per handler) and may be classified as small entities.

With an estimated producer price of \$6.00 per 25-pound container, the number of Florida tomato producers, and assuming a normal distribution, the average annual producer revenue is above \$1,000,000 (\$6.00 times 25.9 million containers equals \$155,400,000 divided by 75 producers equals \$2,072,000 per producer). Thus, the majority of producers of Florida tomatoes may be classified as large entities.

The proposed amendments would change the Committee's size, the length of term of office, and quorum requirements.

The Committee unanimously recommended the proposed amendments at public meetings on November 1, 2018 and

February 27, 2019. If these proposals are approved in a referendum, there would be no direct financial effects on producers or handlers. However, these proposed changes would decrease administrative costs to producers and Committee staff. This action would save time and work for producers and Committee staff, by avoiding the annual requirement to prepare multiple nomination notices and meetings, and the administrative and travel expenses that are required to carry out these annual duties.

Since 1995, the number of producers and handlers operating in the industry has decreased, which makes it difficult to find enough members to fill positions on the Committee. Decreasing the Committee's size would make it more reflective of today's industry. No economic impact is expected if the proposed amendments are approved because they would not establish any new regulatory requirements on handlers, nor would they have any assessment or funding implications. There would be no change in financial costs, reporting, or recordkeeping requirements if this proposal is approved.

Alternatives to this proposal, including making no changes at this time, were considered by the Committee. Due to changes in the industry, AMS believes the proposals

are justified and necessary to ensure the Committee's ability to locally administer the program. Reducing the size of the Committee would enable it to satisfy membership and quorum requirements fully, thereby ensuring a more efficient and orderly flow of business.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178 (Vegetable and Specialty Crops). No changes in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large Florida tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public-sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities

for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this action.

The Committee's meeting was widely publicized throughout the Florida tomato production area. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the November 1, 2018, and February 27, 2019, meetings were public, and all entities, both large and small, were encouraged to express their views on the proposals.

A proposed rule concerning this action was published in the *Federal Register* on October 1, 2019 (84 FR 52044). Copies of the rule were mailed or sent via facsimile to all Committee members and Florida tomato handlers. Finally, the proposed rule was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending December 2, 2019, was provided to allow interested persons to respond to the proposal. No comments were received, so no changes will be made to the amendments as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Findings and Conclusions

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the October 1, 2019, issue of the *Federal Register* are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Tomatoes Grown in Florida." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered, that this entire proposed rule be published in the *Federal Register*.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of

referenda (7 CFR part 900.400-407) to determine whether the annexed order amending the Order regulating the handling of tomatoes grown in Florida is approved by growers, as defined under the terms of the Order, who during the representative period were engaged in the production of tomatoes in the production area. The representative period for the conduct of such referendum is hereby determined to be October 1, 2018, through September 30, 2019.

The agents designated by the Secretary to conduct the referendum are Steven Kauffman and Christian D. Nissen, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 325-8793, or Email: Steven.Kauffman@usda.gov or Christian.Nissen@usda.gov, respectively.

Order Amending the Order Regulating the Handling of Tomatoes Grown in Florida¹

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the Order; and all

¹ This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby proposed to be further amended, and all the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The Order, as amended, and as hereby proposed to be further amended, regulates the handling of tomatoes grown in Florida in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

3. The Order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to

the differences in the production and marketing of tomatoes produced in the production area; and

5. All handling of tomatoes produced or packed in the production area as defined in the Order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of tomatoes grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the Order contained in the proposed rule issued by the Administrator on September 23, 2019 and published in the *Federal Register* (84 FR 52044) on October 1, 2019, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

List of Subjects in 7 CFR Part 966

Tomatoes, Marketing agreements, Reporting and recordkeeping requirements.

Dated: February 14, 2020

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 966 as follows:

PART 966 – TOMATOES GROWN IN FLORIDA

1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In § 966.22 revise paragraph (a) to read as follows:

§ 966.22 Establishment and membership.

(a) The Florida Tomato Committee, consisting of 10 producer members, is hereby established. For each member of the committee there shall be an alternate who shall have the same qualifications as the member.

* * * * *

3. In § 966.23 revise paragraph (a) as follows:

§ 966.23 Term of office.

(a) The term of office of committee members, and their respective alternates, shall be for 2 years and shall begin as of August 1 and end as of July 31.

* * * * *

4. In § 966.32 revise paragraph (a) as follows:

§ 966.32 Procedure.

(a) Six members of the committee shall be necessary to constitute a quorum and the same number of concurring votes shall be required to pass any motion or approve any committee action.

* * * * *